FILED
JUL 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

89-66

No. _____

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1989

JAMES LINDSTROM, KARLA LINDSTROM, TIMOTHY R. MCGOWAN, and ADELE MCGOWAN,
PETITIONERS,

v.

EDWIN H. ALLEN and WENDY L. ALLEN,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Timothy R. McGowan

Petitioner

2548 Five Oaks Rd.
Vienna, VA 22181

(703)827-3940

July 17, 1989

QUESTIONS PRESENTED

1. Whether the Virginia Supreme Court violated the purpose and plain language of the Fourteenth Amendment to the Constitution of the United States by granting an appeal that failed to properly comply with Rule 5:11 of the Rules of the Virginia Supreme Court?

2. Whether the Virginia Supreme Court erred in relying on transcripts provided in violation of Rule 5:11 of the Rules of the Virginia Supreme Court in determination of the final opinion?

3. Whether the Supreme Court of Virginia denied the Petitioners' right of due process in not considering the Findings of Fact and Conclusions of Law of the Virginia Real Estate Board?

LIST OF PARTIES

The parties to the proceedings below were as follows:

James Lindstrom, Karla Lindstrom, Timothy R. McGowan and Adele M. McGowan, petitioners;

Edwin H. Allen and Wendy L. Allen, respondents.

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Petitioners,

v.

EDWIN H. ALLEN and WENDY L. ALLEN,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioners James Lindstrom, Karla Lindstrom, Timothy R. McGowan and Adele M. McGowan respectfully pray that a writ of certiorari issue to review the judgement and opinion of the Supreme Court of Virginia in Edwin H. Allen, et al. v. James Lindstrom, et al., issued on April 21, 1989.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia was issued the 21st of April, 1989 and is reproduced verbatim in Appendix A.

JURISDICTION

The decision of the Supreme Court of Virginia was decided on April 21, 1989. The jurisdiction of this Court to review the judgement of the Supreme Court of Virginia in invoked persuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV of the United States Constitution is involved in the instant case.

STATEMENT OF THE CASE

By this Petition, this Court is asked to review a decision of the Supreme Court of Virginia in granting the appeal of Edwin H. Allen, et al. v. James Lindstrom, et al., as well as the final opinion of the Court.

Background

In April 1986 Edwin H. Allen, et al. was denied specific performance on a contract to purchase real estate in the Commonwealth of Virginia. A Petition for Appeal was filed with the Virginia Supreme Court on the 28th of July, 1986. Rule 5:11(b)

of the Virginia Supreme Court required counsel for the appellants to promptly notify all other counsel of the date on which the transcript is filed. This was never done by the appellants counsel.

Compliance with the Rule is mandatory and failure to comply constitutes a jurisdictional bar to prosecution of the appeal. *Towler v. Commonwealth*, 216 Va. 533, 221 S.E. 2d 119 (1976).

This question was raised before the Virginia Supreme Court in the Motion to Dismiss Petition for Appeal before the appeal was perfected. A copy of this motion is in Appendix A. The motion was denied.

By not notifying counsel of the filing of the transcripts, the witnesses were denied a proper opportunity to correct errors in transcription within a reasonable time after the testimony was given.

The Virginia Supreme Court granted the Petition for Appeal. They relied upon the testimony with the uncorrected transcripts as a basis for the conclusions in the final opinion.

The conclusions are diametrically opposed to the findings of the Judge of the hearings. The Judge relied on the direct testimony of the witnesses; and the witness' demeanor during the proceedings. The conclusions of the Virginia Supreme Court are also contrary to the findings of the Virginia Real Estate Board. The Virginia Real Estate Board held a series of independent investigations and hearings.

REASONS FOR GRANTING THE WRIT

I. This Petition for Certiorari should be granted because the Supreme Court of Virginia violated petitioners' rights under the Rules of the Supreme Court of Virginia.

States have a right to establish their own rules of law. However, when a state fails to follow its own rules of law, a question of Due Process under Amendment XIV is raised. *Field*

v. Boyle, C.A. Ill. 1974, 503 F.2d 774. State courts bear an equal responsibility with federal courts to guard and protect the rights secured by the Constitution of the United States. *Horn v. O'Cheskey*, D.C. N.M. 1974, 378 F. Supp. 1280. By granting the Petition for Appeal, the Virginia Supreme Court failed to enforce its own rules and violated the petitioners' right of Due Process and should be reversed.

II. This petition for Certiorari should be granted because the Supreme Court of Virginia violated the Petitioners' rights of Due Process by relying upon transcripts presented to the Virginia Supreme Court in violation of Rule 5:11 of the Supreme Court of Virginia.

Rule 5:11 stipulates that all counsel be advised of the filing of the transcripts. By breaching this Rule, the witnesses were denied a timely opportunity to correct errors in their testimony.

Reliance on this potentially incorrect transcript by the Virginia Supreme Court in reaching their final opinion violated the petitioners' right of Due Process. The opinion of the Virginia Supreme Court contains incorrect descriptions of the events and their order of occurence. The Virginia Supreme Court should be compelled to rely upon the findings of the Judge, the finder of fact, at the time the testimony was given. The opinion of the Virginia Supreme Court should be reversed.

III. This petition for Certiorari should be granted because the Supreme Court of Virginia violated Petitioners' rights of due process in failing to take under consideration the findings of the Virginia Real Estate Board.

The Virginia Real Estate Board is an agency of the state empowered to make regulations or decide cases related to licensed real estate professionals. Va. Code Section 54-737, Va. Code Section 9-6.14.1. As an agency, its final decisions are subject to judicial notice by all courts and agencies. Va. Code

Section 54-745, Va Code Section 9-14.14.

Between 1985 and 1989 the Virginia Real Estate Board held a series of independent investigations and inquiries. On January 9, 1989, the final ruling of the Virginia Real Estate Board found eight (8) violations of regulations by the real estate professionals in bringing about theAllen contract.

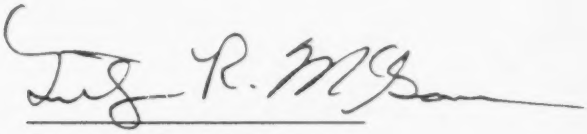
The Supreme Court of Virginia was asked to take notice of the findings of the Virginia Real Estate Board by a Motion to Take Judicial Notice on the 17th of February, 1989.

The Supreme Court of Virginia erred in not considering the Findings of Fact and Conclusions of Law of the Virginia Real Estate Board in its determination that no fraud or misrepresentation existed in the Allens' contract.

CONCLUSION

For these various reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



Timothy R. McGowan
PETITIONER

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IN THE SUPREME COURT OF VIRGINIA

No. 860675
861158
861034

Edwin H. Allen, ET AL.

Respondents – Appellants,

–versus–

James Lindstrom, ET AL.

Petitioners – Appellees.

Opinion of the Supreme Court of Virginia

(April 21, 1989)

PRESENT: All the Justices

EDWIN H. ALLEN, ET AL.

v. Record No. 860675

JAMES LINDSTORM, ET AL.

OPINION BY JUSTICE A. CHRISTIAN COMPTON

April 21, 1989

EDWIN H. ALLEN, ET AL.

v. Record No. 861158

JAMES LINSTROM, ET AL.

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
John J. Karcha, Judge Pro Tempore

TIMOTHY R. McGOWAN, ET AL.

v. Record No. 862034

COLDWELL BANKER RESIDENTIAL REAL ESTATE SERVICES, INC., ET AL.

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
J. Howe Brown, Jr. Judge

In this opinion, we decide appeals of three cases arising from a controversy over the purchase of one parcel of land. The main issues are whether the trial court properly denied a purchasers' request for specific performance and whether a real estate agent owes a duty to a prospective purchaser to communicate a purchase offer to a seller for whom the agent was acting as the exclusive real estate broker.

The basic facts as they relate to the material proceedings in the case are undisputed. In December 1984, James Lindstrom and Karla Lindstrom, his wife, owned a parcel of undeveloped, residential real estate in Fairfax County described as Lot 33, Acredale Subdivision. They decided to sell the property and listed it with Coldwell Banker Residential Real Estate Services, Inc., through its Vienna branch office.

Subsequently, Edwin H. Allen and Wendy L. Allen, his wife, and Timothy R. McGowan and Adele M. McGowan, his wife, became interested in purchasing the property. A flurry of negotiations ensued between the sellers and the Allens, and between the sellers and the McGowans.

On March 19, 1985, the Allens and the sellers executed a sales contract. The total purchase price was $68,000 with closing to occur on August 1, 1985. On May 13, 1985, the McGowans and the sellers executed a sales contract for the property, which was conveyed by the sellers to the McGowans on July 31, 1985 for $72,000.

On August 16, 1985, the Allens filed a bill of complaint (the first case) against the sellers and the McGowans seeking to set aside the the conveyance for specific performance of the Allen contract. Contemporaneously, the Allens recorded in the clerk's office of the court below a lis pendens against the property. In September 1985, the McGowans began clearing the lot and prepared to build a home on the site.

On September 20, the Allens filed another bill of complaint (the second case) against only the McGowans for a temporary injunction to prevent "any further clearing work, or any con-

struction work" on the property until the issues were decided in the first case. On October 11, the trial court entered the injunction requested and required the Allens to post a bond "to hold harmless" the McGowans from any damages resulting from the injunction. In February 1986, the trial court conducted an ore tenus hearing on issues raised in the first and second cases.

In March 1986, the McGowans filed a motion for judgment (the third case) against Coldwell Banker and Max R. Rush, a licensed real estate agent working for Coldwell Banker in the Vienna office. The McGowans sought recovery in damages for alleged wrongful conduct in failing to transmit to the seller one of the offers made by the McGowans to purchase the property.

In April 1986, the trial court announced its ruling that the Allens were not entitled to specific performance and entered an order to that effect. On May 27, 1986, the chancellor entered an order, based on the agreement of counsel, vacating the temporary injunction and releasing the lis pendens. Three days later, the trial court conducted a hearing on the McGowans' claim for damages against the Allens resulting from the granting of the temporary injunction.

In August 1986, the trial court entered an order in the third case sustaining the demurrer and dismissing the McGowans' motion for judgment. In September 1986, the chancellor entered an order awarding the McGowans approximately $45,000 against the Allens for damages sustained as a result of granting the temporary injunction.

We awarded the Allens an appeal (Record No. 860675) from the order denying specific performance and an appeal (Record No. 861158) from the order assessing damages against them. We awarded the McGowans an appeal (Record No. 861034) from the order sustaining the demurrer.

In the first case, the facts on the specific performance question were presented to the trial court by a 39-paragraph stipulation, ore tenus testimony, exhibits, and despositions.

There was very little conflict in the evidence.

In December 1984, the sellers granted Coldwell Banker the exclusive right to sell the property, which was to be offered at a selling price of $72,000. In the listing agreement, Betty Stough was shown as the "lister" and signed the agreement as "Sales Associate."

In February 1985, Mr. Allen was shown the property by Rush, "a real estate agent with Coldwell Banker," according to the stipulation. Allen had called Coldwell Banker's Vienna office in response to a newspaper advertisement for the property and had spoken with Rush, who was the agent on telephone duty at the time. During that month, the Allens submitted an offer through Rush to the sellers with the amount of $62,000. The sellers countered with an offer of $70,000, which the Allens rejected and made no further offer. The Allens then asked Rush to inform them if there was "any more activity" in connection with the sale of the property; Rush agreed to comply with the request. Later, Rush contacted Mr. Allen and advised him that another offer to purchase the property had been submitted, less than the Allens' first offer, and that it probably would not be accepted.

On March 10, 1985, the McGowans made an offer to purchase the property. The offer was made on behalf of the McGowans through Mary Ginty, a real estate agent employed by Jackson-Temple, Inc., realtors. Ginty dealt with Stough, the listing agent at Coldwell Banker. The sellers rejected that offer and made no counteroffer.

During the evening of March 18, 1985, the McGowans, through Ginty, made a second offer. This offer was countered by the sellers and presented to the McGowans during the early morning of March 19. That counteroffer was rejected by the McGowans who thereafter made a counteroffer. The McGowans' counteroffer was rejected by the sellers who made a second counteroffer about 10:30 a.m. on March 19. the sellers' second counteroffer was transmitted to Ginty as agent for the McGow-

ans. The McGowans directed Ginty to make a second counteroffer to the second counteroffer made by the sellers. Stough, believing that the matter was "all settled," left the area before noon on March 19 and Rush agreed to act on her behalf.

About 6:00 p.m. on March 19, Ginty called Rush and indicated "that the contract was acceptable to both parties." There was a sharp conflict in the evidence about the details of this conversation. Ginty testified that she explained to Rush that she possessed what she anticipated was an offer satisfactory to the sellers and asked if he would "assist" her in "going back to" the sellers. She asked Rush to meet her that evening to "go over the contract." Rush replied, according to Ginty, that "he didn't feel any urgency to do it that night" because "the property had been on the market for quite some time." Rush, on the other hand, testified that Ginty did not insist on discussing the matter that evening. He said that Ginty told him, "I don't want to hassle it any more tonight."

About 7:00 p.m. that evening, Rush called Mr. Allen and advised him there was further activity about the sale of the parcel and that, if he wanted to purchase the property, he should make another offer that night. About 9:00 p.m. that evening, Mr. Allen went to the Coldwell Banker office in Vienna where he met Rush. An offer to purchase was prepared for $67,000, the same amount as the sellers' last counteroffer, to the McGowans. Later that evening, Rush and Anice Sutherland, another employee of Coldwell Banker, presented that offer to the sellers; the sellers rejected it and countered with an offer of $68,000, which was accepted by the Allens. The contract in issue was executed that evening. The following day, the sellers sent a telegram to the McGowans withdrawing the outstanding $67,000 counteroffer.

Subsequently, the sellers learned that, on the night the Allen contract was executed, the McGowans wanted to present a counteroffer of $67,000 with conditions more favorable than contained in the Allen contract. The sellers concluded that

critical information had been withheld from them on the night of March 19 and decided to dishonor the Allens' contract. The sellers notified the Allens and the McGowans that the lot would be sold to whomever would pay the original listing price of $72,000.

The Allens refused to become further involved in negotiations. The McGowans, with knowledge of the Allen contract, paid the sellers the listing price and were deeded the property one day before the scheduled closing on the Allen contract.

The trial court ruled, in reusing to grant specific performace of the Allen contract, that Rush was acting as the agent of the Allens on the night of March 19. The court said that Rush was representing "two principals on the opposite side of the same transaction," that Rush's "knowledge and actions were imputed to" the Allens, and that "they were bound by his actions."

The chancellor further opined that Rush and Sutherland "failed to disclose all the facts" to the sellers material to the McGowans' negotiations. In addition, the trial court found that the Coldwell Banker agents "were acting out of a personal motive or interest" that was adverse to the sellers' interest. This was an allusion to the fact that Rush would not have been entitled to a commission unless he was the selling agent. Finally, the trial court said that the events of the night of March 19 in obtaining approval of the Allens' contract "were not only unfair but unreasonable, making the transaction unjust and inequitable."

The trial court's action in denying the Allens' request for specific performance was erroneous. This incorrect ruling stemmed form the erroneous determination that Rush was acting as the Allens' agent on March 19.

We have defined agency "as the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the agreement by the other so to act." Raney v. Barnes Lumber Corp., 195 Va. 956, 966, 81 S.E.2d 578, 584 (1954), accord Nuckols v. Nuckols, 228 Va. 25, 35, 320 S.E.2d 734, 740

(1984). The power of control is the determining factor in ascertaining the alleged agent's status. Texas Company v. Zeigler, 177 Va. 557, 564, 14 S.E.2d 704, 706 (1941).

One who alleges agency must prove it. Raney, 195 Va. at 966, 81 S.E.2d at 584. There is no presumption that an agency exists; a person legally is presumd to be acting for himself and not as the agent for another. Id. And, generally a real estate broker or agent is primarily the agent of the party who first employs him. Price v. Martin, 207 Va. 86, 90, 147 S.E.2d 716, 718 (1966).

In the present case, the evidence is undisputed that Coldwell Banker, and its employee Rush, were the agents of the sellers for the sale of the subject property. The record is devoid of credible evidence, however, to establish that Rush also was the Allens' agent. See Business Properties, Inc. v. Thomas, 187 Va. 284, 46 S.E.2d 337 (1948). There was no agreement, written or oral. Significantly, the Allens did not possess the power to control Rush's actions with relation to the property. While not determinative, Mr. Allen testified that he did not consider Rush his agent, and Rush testified that he was acting solely for the sellers and not the Allens.

Moreover, Rush's actions were consistent with the agency relationship between Coldwell Banker and the sellers. Rush merely dealt with a prospective purchaser, agreed to keep the prospect advised of sales activity, and notified the prospect when negotiations were renewed. This was conduct wholly compatible with Coldwell Banker's obligation to the seller to produce the best possible deal. As the Allens point out, the question whether Rush performed his duty as agent for the sellers is a separate issue from the question whether Rush was acting as agent for the Allens.

Consequently, because Rush was not the Allens' agent, we will reverse the decree of April 25, 1986 denying the Allens' request for relief. The sellers and the McGowans argue, however, that even if we rule Rush was not the Allens' agent, the

Allens nevertheless are not entitled to specific performance. The sellers and the McGowans say that the trial court found that the circumstances surrounding the sellers' decision to sell to the Allens "were poisoned by the fraud and misrepresentation precipitated by the greed of Rush and that enforcing a deal so made would not be equitable." We do not agree.

The failure of the sellers' agent to reveal information to them is insufficient to justify denial of specific performance to the Allens, there being no evidence that the Allens participated in Rush's alleged improper conduct. Moreover, the McGowans will not be heard to complain about the inequities of the situation when they purchased the property with full knowledge of the Allens' contract and thereafter proceeded, in the midst of pending litigation, to improve the property. Although the granting of specific performance is discretionary and not an absolute right, if the contract sought to be enforced is proved and is in its nature and circumstances unobjectionable, a court of equity should decree specific performance as a matter of course. Haythe v. May, 223 Va. 359, 361, 288 S.E.2d 487, 488 (1982).

Thus, we will remand the first case to the trial court with direction that the Allens be awarded specific performance of the contract of March 19, 1985 in accordance with the prayer of the Allens' bill of complaint. In view of this ruling, it follows that the trial court erred in the second case. Because the Allens were entitled to specific performance, the trial court property enjoined the work on the property during pendency of the litigation. Therefore, the trial court erred in awarding any damages to the McGowans against the Allens arising from the temporary injunction. Accordingly, the judgment of September 8, 1986 for the McGowans will be set aside and final judgment will entered here in favor of the Allens.

This brings us to the third case. In this action for damages brought by the McGowans against Coldwell Banker and Rush, we must state the facts, not the legal conclusions, as set forth in the motion for judgment, the demurrer having admitted the truth

of all material facts properly pleaded.

During March 1985, the plaintiffs became interested in purchasing the subject property. The sellers previously had entered into a listing agreement with Coldwell Banker, the broker, concerning sale of the property. Rush, an agent of the broker, was not the listing agent and, therefore, would not have received any commission on the sale of the property unless he was the selling agent; that is, unless he produced a ready, willing, and able buyer. The plaintiffs relied upon Jackson-Temple, Inc., and its employee, Ginty, to assist them in connection with the purchase of the property.

On March 18, after extensive negotiations, the plaintiffs submitted an offer to purchase the property to Jackson-Temple and Ginty. On that day, Ginty transmitted the plaintiffs' offer to defendants who held themselves out as the sellers' agents and the proper parties to whom all offers to purchase should be transmitted. The plaintiffs relied upon defendants to convey their offer to the sellers.

Nevertheless, defendants maliciously and intentionally failed to transmit the purchase offer to the sellers so that the entire sales commission would be received by Coldwell Banker and so that Rush would be the selling agent in connection with the sale. Alleging the defendants acted willfully, wantonly, and with intent to defraud, the plaintiffs sought an award of compensatory and punitive damages.

The plaintiffs contended that "pursuant to the rules and regulations of the Virginia Real Estate Commission [now Virginia Real Estate Board], the Defendants had a duty to convey the Plaintiffs' offer to purchase the real property to the Sellers." The regulation relied upon by the plaintiffs provides for sanctions against real estate professionals who fail "to promptly tender to the seller every written offer to purchase." § 3.5.15, Regulations of the Virginia Real Estate Commission (1984), now § 3.5.16, Virginia Real Estate Board Licensing Regulations (1987).

In sustaining the demurrer, the trial court ruled that the plaintiffs had failed to state a cause of action because, while Rush may have breached a duty to the sellers, he did not owe a duty to the prospective purchasers to communicate an offer to the sellers. The court also noted that neither actual fraud nor misrepresentation had been pled. The court further decided that ethical rules and regulations "may not provide the basis of a private cause of action under the circumstances of this case." We agree with the trial court's ruling.

Plaintiffs invite us to extend an administrative rule governing conduct of real estate agents and brokers, and to create a private cause of action in favor of prospective purchaser against an agent of the seller for whom the agent was acting as the exclusive broker. We decline the invitation. See Klotz v. Fauber, 213 Va. 1, 189, S.E.2d 45 (1972).

In reaching our decision we draw on the analysis in Ayyildiz v. Kidd, 220 Va. 1080, 266 S.E.2d 108 (1980), also relied upon by the trial court. There, a licensed physician was sued unsuccessfully for malpractice by one of his patients. The physician then filed a motion for judgment against the patient's attorney, alleging the malpractice action was prosecuted without probable cause and with malice. The plaintiff also alleged the attorney's conduct fell below the legal standards of the community and that his willful and negligent acts caused the plaintiff damages.

We affirmed the trial court's action in sustaining defendant's demurrer. Addressing the allegation of injury caused by the negligence of the attorney, we pointed out that the attorney-client relationship was between the patient and the defendant attorney, and not between the plaintiff and the defendant. We said that an attorney's liability generally is to his client if the attorney has been guilty of some dereliction of duty to the client. We noted that the attorney's primary and paramount duty is to the client. While lawyers owe a general duty to the judicial system, it is not the type of duty that translates into liability to

an adversary for negligence when there is no foreseeable reliance by the adversary on the attorney's actions. Id. at 1085, 266 S.E.2d at 112.

In addition, we stated that the rules of conduct promulgated in the Code of Professional Responsibility furnished no basis for a private cause of action. We observed, however, that disciplinary proceedings could be filed before the appropriate body against the offending lawyer. Id. at 1085-86, 266 S.E.2d at 112.

We apply precisely the same reasoning to the present case. The defendants' primary and paramount duty, as broker and broker's agent, was to the sellers, with whom they had an exclusive contract. While there may be some type of general duty to the public owed by every realtor, it is not the type of duty that converts into a liability against a seller's agent for improper conduct to one in the adversary position of prospective purchaser, where there is no foreseeable reliance by the prospect on the agent's actions. Even though the plaintiffs alleged in the conclusory averment that they relied on defendants to transmit the offer, there is no factual allegation of any direct contact or communication between the McGowans and the defendants. Indeed, there is no factual allegation that the plaintiffs even know the identify of the sellers' agent or knew that an agent of the sellers was involved. Rather, the plaintiffs alleged they relied upon Jackson-Temple and Ginty.

Consistent with the Ayyildiz rationale, the public is protected adequately from the type of misconduct asserted by the plaintiffs by administrative regulation and policing of the real estate profession. See Virginia Real Estate Commission v. Bias, 226 Va. 264, 269-70, 308 S.E.2d 123, 125-26 (1983) (real estate broker, guilty of self-dealing, had responsibility as agent of seller to communicate all offers regardless of value). The creation of a new legal duty giving rise to a private cause of action for damages should not be accomplished by judicial fiat.

Finally, we reject the plaintiffs' argument that the third party beneficiary doctrine permits them, as non-parties to the

contract between the sellers and defendants, to maintain this action. Construing the third party beneficiary statute, Code § 55-22, we have said that the doctrine "is subject to the limitation that the third party must show that the parties to the contract clearly and definitely intended it to confer a benefit upon him." Professional Realty Corp. v. Bender, 216 Va. 737, 739, 222 S.E.2d 810 (1976). There is no allegation in the motion for judgment to support a conclusion that the listing agreement in this case "clearly and definitely" intended to confer a benefit upon prospective purchasers.

For these reasons, the disposition of the three appeals will be indicated below.

Record No. 860675 — Reversed and remanded.
Record No. 861158 — Reversed and final judgment.
Record No. 861034 — Affirmed.

IN THE SUPREME COURT OF VIRGINIA

No. 860675

Edwin H. Allen, ET AL.

Respondents – Appellants,

–versus–

James Lindstrom, ET AL.

Petitioners – Appellees.

Motion to Dismiss Petition for Appeal

(August 5, 1986)

Before the Supreme Court of Virginia

IN THE SUPREME COURT of VIRIGNIA at RICHMOND

RECORD NO. 860675

EDWIN H. ALLEN, et al.,	:	
	:	
Appellants	:	
	:	
vs.	:	IN CHANCERY NO.
	:	93488
JAMES LINDSTROM, et al.,	:	
	:	
Appellees	:	
.....	:	
	:	
EDWIN H. ALLEN, et al.,	:	
	:	
Appellants,	:	
	:	
vs.	:	IN CHANCERY NO.
	:	93960
TIMOTHY R. McGOWAN, et al.,	:	
	:	
Appellees	:	

MOTION TO DISMISS PETITION FOR APPEAL

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IN THE SUPREME COURT of VIRGINIA at RICHMOND

EDWIN H. ALLEN, et al.,	:	
	:	
Appellants	:	
	:	
vs.	:	
	:	
JAMES LINDSTROM, et al.,	:	
	:	
Appellees	:	
.....	:	RECORD NO. 860675
	:	
EDWIN H. ALLEN, et al.,	:	
	:	
Appellants,	:	
	:	
vs.	:	
	:	
TIMOTHY R. McGOWAN, et al.,	:	
	:	
Appellees	:	

MOTION TO DISMISS PETITION FOR APPEAL

To: Edwin H. Allen
Wendy L. Allen
c/o Walter B. Golden, III, Esquire
Post Office Drawer No. 2405
9701 Main Street
Fairfax, Virginia 22031

COME NOW the Appellees, TIMOTHY R. and ADELE M. McGOWAN (the "McGowans") by Counsel, and file this Motion to Dismiss the Petition for Appeal previously served and filed herein, and in support thereof, respectfully state as follows:

1. The Order appealed from is not a Final Order.
2. The order appealed form is not an appealable interlocutory order within the meaning of Va. Code §8.01-671(B).
3. The Appellants have failed to comply with the provisions of Rule 5:11.
4. Judicial economy will be best served by permitting the trial court to resolve and finally determine all the rights and obligations of the parties.

WHEREFORE, the Appellees respectfully request that the Petition for Appeal previously served and filed herein be dismissed and that this matter be remanded to the trial court for such further proceedings or orders as may be consistent with the ruling of this Court.

TIMOTHY R. McGOWAN
ADELE M. McGOWAN
By Counsel

REES, BROOME & DIAZ, P.C.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss Petition for Appeal, and accompanying Memorandum of Points and Authorities was served, by hand delivery, on Walter B. Golden, III, Esquire, Counsel for Appellants, at Post Office Drawer No. 2405, 9701 Main Street, Fairfax, Virginia 22031, this 5th day of August, 1986.

_____

Henry F. Brandenstein, Jr.

HFB:ahs
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EDWIN H. ALLEN, et al.,	:	
	:	
Appellants	:	
	:	
vs.	:	
	:	
JAMES LINDSTROM, et al.,	:	
	:	
Appellees	:	
.....	:	RECORD NO. 860675
	:	
EDWIN H. ALLEN, et al.,	:	
	:	
Appellants,	:	
	:	
vs.	:	
	:	
TIMOTHY R. McGOWAN, et al.	:	
	:	
Appellees	:	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE APPELLEES MOTION TO DISMISS PETITION FOR APPEAL

COME NOW the Appellees, TIMOTHY R. and ADELE M. McGOWAN, by Counsel, and in support of their Motion to Dismiss the Petition for Appeal previously served and filed herein submit this Memorandum of Points and Authorities.

Procedural Background:

On August 16, 1985, the Appellants, EDWIN H. and WENDY L. ALLEN, (the "Allens"), filed a Bill of Complaint for Specific Performance (Chancery No. 93488) with the Circuit Court of

Fairfax County. Thereafter, on September 20, 1985, the Allens filed a Bill of Complaint for a Temporary Restraining Order (Chancery No. 93960). The two (2) causes of action were consolidated for the purposes of trial.

The Allens sought to specifically enforce a contract to purchase real property and damages from James and Karla Lindstorm. The McGowans were the record owners of the real property at the time the Allens filed suit and it subsequently came to the Allen's attention that the McGowans had commenced the construction of a home on the property. Thereafter, the Allens sought and obtained a temporary injunction restraining any further construction activity.

The Lindstroms defended the suit for specific performance on the grounds, inter alia, that the contract in question had been procured by fraud. The McGowans counterclaimed against the Allens for slander of title and sought to recover delay damages against the Allens injunction bond.

The parties agreed that their claims and counterclaims would be bifurcated into two (2) hearings. The initial hearing would concern the Allens request for specific performance and the Appellees defenses thereto. The second hearing was to be held to determine the measure of damages, if any, owed to the party that prevailed at the time of the first hearing.

The initial evidentiary hearing on the issue concerning the Allens right to specific performance was held on February 28, 1986 and a letter opinion was issued by the trial court dated April 4, 1986. (See Exhibit A attached hereto). The Order appealed from was entered on April 25, 1986. (Exhibit B) A hearing on the issue of damages was held on May 30, 1986. As of the date hereof, no memorandum opinion has been issued by the Judge in connection therewith.

Argument:

I. THE ORDER APPEALED FROM IS NOT A FINAL ORDER.

Virginia Code §8.01-670(A)(3) provides that an aggrieved party may present a petition for appeal to "a final judgment in any ... civil case". A final judgment is one that disposes of the whole subject matter, gives all relief contemplated by the parties, ends the cause of action and requires no further action by the court. Burch v. Harwicke, 64 Va. (23 Gratt) 51 (1873); Gills v. Gills, 126 Va. 526, 101 S.E. 900 (1920); Ashworth v. Hagan Estates, Inc., 165 Va. 151, 181 S.E. 381 (1935); Dearing v. Walter, 175 Va. 555, 9 S.E.2d 336 (1940). In the instant case there are numerous other issues which require further action by the trial court. Therefore, the cause is not final and the matter is not ripe for appeal.

II. THE ORDER APPEALED FROM IS NOT AN APPEALABLE INTERLOCUTORY ORDER.

Va. Code §8.01-670(B)(3) provides that in a chancery proceeding an aggrieved party may present a petition for appeal from any interlocutory decree "adjudicating the principles of a cause".[1]

The meaning of the applicable statutory provision is not subject to precise definition. However, a general standard of review has developed concerning the extent of an aggrieved party's right to appeal from an interlocutory decree that "adjudicates the principles of a cause."

---

[1] The provisions of Va. Code §8.01-670(b)(1) are not applicable since the Allens assert at page 6 of their Petition for Appeal that they voluntarily dissolved the injunction. See generally, Hounshell v. Hounshell, 116 Va. 675, 82 S.E. 689 (1914).

In Lancaster v. Lancaster, 86 Va. 201, 9 S.E. 988 (1889), the court held:

> It is difficult, if not impossible to define exactly what is meant by adjudicating the principles of a cause in such a way as to fit every case; but it must mean that the rules or methods by which the rights of the parties are to be finally worked out have been so far determined that it is only necessary to apply these rules of methods to the facts of the case in order to ascertain the relative rights of the parties with regard to the subject matter of the suit. 86 Va. at 204-205, 9 S.E. at 990; cited with approval in Thrasher v. Lustig, 204 Va. 399, 131 S.E.2d 186 (1963).

The order appealed from decides only one issue: the Allens are not entitled to specific performance. The remainder of the controversy between the parties is left unresolved and the trial court's order has not established any rules or methods by which the case can be finalized. When the court determines a preliminary question but leaves the rest of the case for further action by the court, the preliminary determination has not adjudicated the principles of the cause. Cf. Lee v. Lee, 142 Va. 244, 128 S.E. 524 (1925).

III. THE ALLENS HAVE FAILED TO COMPLY WITH RULE 5:11.

Rule 5:11(a) requires that the transcript of a proceeding be filed with the clerk of the trial court within sixty (60) days after entry of judgment. Rule 5:11(b) requires counsel for the appellants to promptly notify all other counsel of the date on which the transcript is filed. Compliance with the provisions of the Rule is mandatory and failure to comply constitute a jurisdictional bar to the prosecution of the appeal. Towler v. Commonwealth, 216 Va. 533, 221 S.E.2d 119 (1976). The Allens have failed to comply with the provisions of Rule 5:11

and their Petition for Appeal should be dismissed.

V. JUDICIAL ECONOMY REQUIRES THE DISMISSAL OF THE PETITION FOR APPEAL.

As of the date hereof the trial court has not issued any opinion concerning the issue of damages. Indeed, the trial judge has indicated that he may await a final determination of this Court before taking any further action.

Assuming, arguendo, that the Allens Petition for Appeal is properly perfected, and that a Writ of Appeal is subsequently denied, then the trial court will issue an opinion on the issue of damages, Thereafter, any party aggrieved by that order, it clearly being a final order, will have a right to petition for appeal. In such event, this Court will be asked to consider the issues raised by this case sequentially rather than simultaneously. Such a result will cause a multiplicity of appeals and necessarily increase the costs and expenses incurred by each of the parties hereto. For these reasons, this Court should now dismiss the Petition for Appeal as premature.

Conclusion:

The Order appealed from is not a final appealed order. Similarly, the Order appealed from does not adjudicate the principles of the cause and there are many issues yet to be decided by the trial court. Finally, judicial economy requires that this Court dismiss the Petition for Appeal at this time.

TIMOTHY R. McGOWAN
ADELE M. McGOWAN
By Counsel

REES, BROOME & DIAZ, P.C.

By: _____

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22209I

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

No. 93488
93960

Edwin H. Allen, ET AL.

Respondents – Complainants,

–versus–

James Lindstrom, ET AL.

Petitioners – Defendents.

Letter Opinion of the Circuit Court Judge

(April 4, 1986)

Before John J. Karcha,

Circuit Judge Pro Tempore

John J. Karcha
Attorney and Counsellor at Law
3989 Chain Bridge Road
(P.O. Box 1008)
Fairfax, Virginia 22030

Leigh Building
(703) 385-5711

April 4, 1986

Walter B. Golden, III, Esq.
P.O. Box 2405
Fairfax, VA 22031

Henry F. Brandenstein, Jr., Esq.
8133 Leesburg Pike, Suite 810
Vienna, VA 22180

Re: Allen et al, vs. Lindstrom et al, Chancery No. 93488
Allen et al, vs. McGowan et al, Chancery No. 93960

Gentlemen:

After reviewing the pleadings in these causes, the Pre-Trial Order with Stipulation of Facts attached, the ten (10) Joint Exhibits, the Complainants' Exhibit, the Defendants' Exhibit, the Hearing Transcript of February 28, 1986, the Trial Briefs, the Post-Trial Briefs, and after considering the demeanor of the witnesses, the Court is of the following opinion:

The Defendants, James and Karla Lindstrom, entered into a Listing Agreement with Coldwell Banker Realtors to sell their real property known as Lot 33, Acredale Subdivision, Fairfax County, Virginia. Betty Stough was the listing agent.

Max Rush, a real estate agent with the same Coldwell Banker Office, was acting as the agent for the Complainants, Edwin and Wendy Allen, and was acting on behalf of and sitting in for Betty Stough on the evening and night of March 19, 1985. Then and there, Mr. Rush was acting for two principals on the opposite side of the same transaction. As agent for the Allens, his knowledge and actions were imputed to them, and they were bound by his actions.

Mr. Rush and Anice Sutherland, the Branch Manager and Officer of Coldwell Bank, on the evening and night of March 19, 1985, did not exercise the utmost good faith towards the Lindstroms, in that they failed to disclose all the facts, especially with respect to the McGowans' negotiations and contract, which were material to the Allens/Lindstroms transaction, which would have influenced the Lindstroms in deciding a course of action. The Lindstroms had the right to assume that when they employed Coldwell Banker Realtors, unless advised to the contrary, that these real estate agents were in a situation to give them, as principals, undivided allegiance and loyalty which the proper performance of the agency requires. Yet the Lindstroms on this night were practically unrepresented and the agents were acting out of a personal motive or interest that was adverse to the Lindstroms' interest.

Upon consideration of all the circumstances of the case and especially the events of the evening and night of March 19, 1985, the actions in obtaining the signatures and approval of the Allens' contract were not only unfair but unreasonable, making the transaction unjust and inequitable.

The Court is of the opinion that upon the facts of this case, and in the exercise of sound discretion, it should decline relief by the exercise of its power of specific performance with respect to the Allens/Lindstroms contract dated March 19, 1985.

For the reasons stated by Court denies the prayer of the Bill for specific performance. A decree may be prepared accordingly, making this opinion a part of the record.

Very truly yours,

John J. Karcha

Judge Pro Tempore

JJK/diy

cc: Warren Barry, Clerk

VIRGINIA REAL ESTATE BOARD

No. 85-01684

Virginia Real Estate Board

Complainant,

–versus–

Max Rush and Anice Sutherland,

Respondents.

Findings of Fact and Conclusion of Law

(September 7, 1988)

Before Virginia Real Estate Board

VIRGINIA: BEFORE THE REAL ESTATE BOARD

VIRGINIA REAL ESTATE BOARD,)		
	)	
Complainant	)	
	)	
vs.	)	File No. 85-01684
	)	
MAX RUSH, and	)	
	)	
ANNA SUTHERLAND	)	
	)	
Respondents	)	
	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A formal Administrative hearing was held on July 12, 1988 at 10:00 A.M. and resumed on July 13, 1988 at 10:00 A.M., pursuant to a Notice of Hearing dated June 9, 1988, authorized by Sec. 9-6.14:12. Code of Virginia (1950) as amended, and the rules and Regulations of the Virignia Real Estate Board. The hearing was held at the Tyson's Westpark Hotel, 8401 Westpark Drive, McLean, Virginia, and all parties hereto were present throughout the proceedings.

FINDINGS OF FACT

1. Max Rush is licensed by the Virginia Real Estate Board to act as a real estate salesman, and Anice Sutherland is a licensed Associate Broker (Exh. 10).
2. James D. Lindstrom and his wife Karla Lindstrom listed lot 33, an unimproved lot in Acredale Subdivision, in Fairfax County with Coldwell Banker through Stough, an agent of Coldwell Banker on December 17, 1984, at a selling price of Seventy-two Thousand Dollars ($72,000.00) (Exh. 1).

3. On February 14, 1985, Edwin H. Allen and Wendy L. Allen (the Allens) made an offer on the Lindstrom's property through Rush, an agent of Coldwell Banker. The offer was rejected but the Allens asked Rush to keep them apprised of the status of the property (Tr. 48 and Exh. 12).
4. On March 18, 1985, at approximately 7:00 P.M., Timothy R. McGowan and Adele M. McGowan with Mary S. Ginty, an agent of Jackson Templeton Realty, drafted an offer for the Lindstroms' property (Tr. 129).
5. Ginty and E.B. Stough of the Coldwell Banker offer in Vienna presented this offer to the Lindstroms at 10:30 on the night of March 18, 1985. Negotiations were conducted until 12:30 in the morning of March 19th resulting in a counter offer from the Lindstroms. Mrs. Lindstrom initialled the counter offer in the morning which was delivered to Ginty at about 7:00 A.M. on March 19th. (Tr 51-54, Tr. 2-132.)
6. Ginty reported the counter offer to the McGowans by telephone who made a verbal change to the counter offer early on the morning of March 19. This change was reported to the Lindstroms orally about 9:30 A.M. The changes were agreed to orally and Ginty was to insert the changes in the contract and bring the document back to the Lindstroms to be initialed by them that day (Tr. 2-133, 2-197).
7. After this series of oral exchanges. Stough through there had been a meeting of minds requiring only an initialling of the written amendments so she left for North Carolina and designated Rush from her agency to follow through on the delivery of the documents (Tr. 2-137, Tr. 2-197).
8. On the morning of March 19 the Lindstroms concluded that the contract offered by Ginty did not embody the terms agreed to earlier, so they changed and initialled the contract at about 10:30 A.M. (Tr. 2-134).
9. Ginty took the changed contract back to the McGowans for approval. Mrs. McGowan initialed the change but when Ginty returned to the McGowans at 5:30 P.M. Mr. McGowan

refused to initial the change and asked Ginty to take the offer back to the Lindstroms (Tr. 2-20,21, Tr. 2-136).

10. At approximately 6:00 P.M. Ginty called Rush at home and advised him that there was a problem with respect to the contract (Tr. 2-137). Ginty testified that she asked to meet with Rush to seek to resolve the differences of the offer and that Rush stated that he would not go back to his office that night and since there was no urgency, he would meet with Ginty at his office the next morning on March 20th (Tr. 2-138). Rush's testimony as to the substance of the conversation denies that Ginty mentioned a counteroffer or that she requested to meet with the sellers (Tr. 2-225). Even if we accept Rush's version of the conversation it is clear that he was put on notice that there was a prospective purchaser interested in the land who in fact was well known to Rush's firm because of the negotiations participated in by Stough. In fact in the call later that evening with Allen, Rush told Allen that a "contract is working" (Tr. 2-215). The argument made by Rush (Para. 16 of Respondent's Proposed Findings of Fact) that Ginty should have contacted Rush's manager applied only if "Ginty had thought Rush was not complying with any request she had made ...". Ginty, apparently from the tenor of Rush's response to her call, had no reason to believe that an appeal to higher authority was necessary.
11. After this conversation, Rush called his managing broker, Sutherland, told her about this conversation with Ginty and asked if he could contact the Allens. She told him that he could contact the Allens (Tr. 2-215, 2-222).
12. Rush called Allen and told him that a "contract is working" and if he still was interested "he should make an offer ..." (Tr. 2-215.
13. Rush, Sutherland and Allen met at 9:00 P.M. on March 19 at the Coldwell Banker office and drafted an offer for the Lindstroms' property (Tr. 2-216).

14. After the offer was prepared that evening Sutherland called the Lindstroms and arranged to meet with them. Mr. Lindstrom inquired about the McGowan offer, to which Sutherland answered that she didn't know anything about it (Tr. 63.155, 165).
15. When Rush and Sutherland arrived at the Lindstroms' home about 9:30 P.M. on March 19, to present the Allen offer, Mr. Lindstrom again asked about the status of the McGowan contract (Tr. 64, Tr. 2-217). Sutherland responded that they did not know the status of the contract (Tr. 64, Tr. 2-217).
16. Lindstrom, believing that the McGown contract had fallen through, thought that the Allen contract was his only hope to sell the property (Tr. 61, 167).
17. Lindstrom made a counter offer by raising the price by $1,000 (Tr. 2-219).
18. Rush promptly called Allen at his home and arranged to meet Allen at the Key Bridge Marriott Hotel in order to present the Lindstrom counter offer (Tr. 2-220). Allens accepted the counter offer at about 11:00 P.M. on March 19 to constitute an effective contract (Tr. 104, and Exh. 3).
19. Sutherland called Ginty at about 11:10 P.M. the same evening of March 19, 1985, to inquire about the McGowan contract. Sutherland told Ginty that the property was sold (Tr. 139).
20. If the Allen contract had been carried out, Rush would have received a commission. If the McGowan contract had been carried out, Rush would not have received a commission (Tr. 2-181).

CONCLUSIONS OF LAW

Max Rush and Anice Sutherland are charged with violating the following four Virginia Real Estate Board Regulations:

3.5.6 Acting for more than one party in a transaction without the knowledge of all parties for whom the licensee acts;

3.5.15 Failing as a licensee to promptly tender to the seller every written offer to purchase or obtain the property involved.

3.5.27 Making any misrepresentation;

3.5.35 Being unworthy or incompetent to act as a real estate broker or salesman in such a manner as to safeguard the interests of the public, or otherwise engaging in improper, fraudulent, or dishonest conduct.

Did Rush and Sutherland, who were agents of the Lindstroms by virtue of their representation of Coldwell Banker, breach their fiduciary duty to their principals for their personal benefit, by failing to tell the Lindstroms of the existence of a counteroffer by the McGowans on the evening of March 19, 1985?

There is an absolute duty " ... imposed by law upon the fiduciary, to disclose anything known to him which might affect the principal's decision whether or how to act ..." Owen v. Shelton, 221 Va. 1051, 1054 (1981) (Emphasis added).

It is clear that Rush knew the McGowans were interested enough in the Lindstrom's property to have negotiated to a point where their colleague Stough regarded the deal as closed as far as substantive matters were concerned. And as late as 7:00 PM of March 19, 1985 Rush was told in a telephone that Ginty had

a counteroffer from the McGowans and wanted to see Rush and Lindstroms. Ginty testified that Rush told her there was no rush that Ginty could come to his office in the morning. While Rush denies the detail of the conversation, it is clear that he was on notice that there was a serious offer for the Lindstrom's consideration because he told Allen that a "contract is working". But when Mr. Lindstrom asked about the McGowan contract later that evening Sutherland answered that she didn't know anything about it and Rush remained silent.

There is a ready explanation and motive for Rush's actions. He would make a personal gain by earning a sales commission if the Allen contract was concluded and none if the McGowan contract went to settlement.

The argument that the Allen contract was a better contract does not relieve Sutherland nor Rush of their fiduciary duty to disclose all information.

> "The presence or absence of 'detriment' to the seller, caused by ... non-disclosure, is irrelevant. A broker's duty to communicate an offer promptly to the seller is absolute. It does not depend upon the broker's evaluation of the offer as advantageous or otherwise. That decision is the seller's alone." Virginia Real Estate Commission v. Bias, 226, Va. 264. 269-270 (1983).

The failure to present the McGowan counter offer made more egregious by the haste with which the Allen offer was presented, constituted a violation of regulation 3.5.15.

When Lindstrom asked about the status of the McGowan offer and Rush and Sutherland did not disclose Rush's earlier telephone discussion nor that the "contract is working", this constituted a misrepresentation in violation of Regulation 3.5.27. Had Lindstrom been aware of the counteroffer of McGowan he could have entered into a "bidding war", which conceivably

would have resulted in a more advantageous contract for the Lindstroms. In actuality, the McGowans did at a later time bid and bought the Lindstrom's property at a significantly higher price (Tr. 190).

By disclosing to Allens the pendency of the McGowan offer, while they withheld that information from their principal Lindstrom, Rush and Sutherland favored the interest of Allen and not Lindstrom. This was done without informing Lindstrom of their interest in the Allen contract. This violated Regulation 3.5.6.

There is substantial evidence form the activities described in the Record that both Rush and Sutherland violated Regulation 3.5.35 because they acted improperly.

September 7, 1988

Paul Reiber
Hearing Officer

(2)

Supreme Court, U.S.
FILED
AUG 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-66

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAMES LINDSTROM, *et al.*,

Petitioners,

v.

EDWIN H. ALLEN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF OF RESPONDENTS EDWIN H. ALLEN AND WENDY L. ALLEN IN OPPOSITION TO PETITION

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IN THE

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JAMES LINDSTROM, *et al.*,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF OF RESPONDENTS EDWIN H. ALLEN AND WENDY L. ALLEN IN OPPOSITION TO PETITION

The Petition filed by Timothy R. McGowan[1] herein seeks review of a decision by the Supreme Court of Virginia granting specific performance of a contract for the sale of land. Mr. McGowan contends that his Due Process rights were violated in the course of the proceedings below. That contention is simply unfounded. The case is governed by the substantive and procedural law of Virginia. It presents no federal question at all, let alone an important or compelling question. The

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[1]Mr. McGowan, an Appellee in the case below, filed the Petition pro se. While Mr. McGowan has included the other Appellees in caption of his Petition, apparently none of the other three Appellees joined in his Petition.

Petitioner failed to inform this Court that neither the Fourteenth Amendment, nor any other provision of the United States Constitution, nor any federal law was even mentioned during the litigation. There is, in any event, no conceivable ground for arguing that there has been a violation of Petitioner's Constitutional rights.

STATEMENT OF THE CASE

The essential facts of this case are set forth in the Opinion of the Supreme Court of Virginia entered April 21, 1989, which is reproduced in the Appendix to the Petition. On March 14, 1985, Respondents Edwin and Wendy Allen entered into a contract with James and Karla Lindstrom under which the Lindstroms were to sell to the Allens a parcel of an undeveloped residential property in Fairfax County, Virginia. The Lindstroms failed to perform their obligations under the contract, however, and subsequently conveyed the property by deed to Petitioner Timothy McGowan and his wife Adele.

The Allens filed suit in the Circuit Court of Fairfax County, Virginia seeking to set aside the deed of the property to the McGowans, and for specific performance of their agreement with the Lindstroms. That proceeding was styled *Edwin H. Allen, et al. v. James Lindstrom*, et al., Case No. 93488. The Allens filed a separate suit seeking an injunction against the McGowans to prevent them from clearing and/or building on the lot. *Edwin H. Allen, et al. v. Timothy McGowan, et al.*, Case No. 93960.

The trial court initially granted the Allens a temporary injunction prohibiting the McGowans from further clearing or building on the lot. The cases were consolidated for trial and, by order entered April 25, 1986, the trial court denied the Allens specific performance of the contract. The Court also dissolved the temporary injunction. It subsequently entered

an order on September 8, 1986, awarding the McGowans damages resulting from the temporary injunction.

The Allens timely filed Petitions for Appeal to the Supreme Court of Virginia of both orders. By Motion dated August 5, 1986, Mr. McGowan moved to have the Petition for Appeal of the April 25th order dismissed citing, among other things, the Allen's failure to comply with Rule 5:11 of the Supreme Court of Virginia. That Rule provides that "[t]he transcript of any proceeding is a part of the record when it is filed in the office of the clerk of the trial court within 60 days after entry of judgment." It further provides for notice of the filing of the transcript to other counsel of record. The Virginia Supreme Court denied the motion to dismiss by order entered September 11, 1986.

The Supreme Court of Virginia granted the Allen's Peti tions for Appeal in both cases. The briefing schedule was completed December 8, 1987, and oral argument was set for February 27, 1989. On February 17, 1989, the McGowans moved the Court to take judicial notice of two decisions of the Virginia Real Estate Board issued September 7, 1988, concerning four real estate agents who had been involved in the negotiations between the Allens and the Lindstroms and between the McGowans and the Lindstroms with respect to the property at issue in the cases. The Allens filed a Brief in Opposition to such motion. By order entered April 21, 1989, the Supreme Court of Virginia reversed the trial court and awarded the Allens specific performance of the Allen-Lindstrom contract. The Court has not entered any orders or taken any action which indicate how it resolved the motion, if at all.

ARGUMENT

1. The Petition Should Be Dismissed, As No Issues of Federal Law were Raised or Decided Below.

The Petition makes what appears to be an effort to comply with Rule 21(h) of the Supreme Court of the United States by describing how certain procedural issues were raised and decided in the Virginia Supreme Court. (Pet. 2-3.) But the petition does not actually assert that those issues were raised or decided below as federal questions. It does not because it cannot. The issues argued by counsel were solely matters of state law, and the Virginia Supreme Court decided the case based solely on issues of state law. This Court, therefore, has no jurisdiction of the case.

2. The Petitioner's Rights of Due Process Were Not Violated by the Decision of the Supreme Court of Virginia Denying Petitioner's Motion to Dismiss Petition for Appeal Based on the Allens' Failure to Give Notice of the Filing of the Trial Transcript Pursuant to Rule 5:11 of the Supreme Court of Virginia

There would, in any event, have been no merit to any claim under the Constitution of the United States respecting the substance of the questions Petitioner presents. The first and second questions stated by Petitioner allege that the Supreme Court of Virginia violated his rights of Due Process by failing to enforce its own Rule 5:11, which provides that "the transcript of a proceeding is a part of the record [on appeal] when it is filed with the clerk of the trial court within 60 days after the entry of judgment," and further requires counsel for the "appellant" to give notice to the other parties of the filing. Petitioner does not allege that the transcript was not timely filed, but only that the Allens did not give notice thereof.

As the Allens pointed out to the Virginia Supreme Court, this case was heard by a Judge Pro Tempore of the Circuit Court of Fairfax County pursuant to VA. CODE §17-9. The parties entered into a written stipulation, endorsed by all counsel of record, in which the parties agreed to the appointment of the Judge *Pro Tempore* and further stipulated that he was "to cause a transcript of the proceeding [therein] to be prepared and [to] submit a written transcript to the Clerk of the Court for inclusion in the file of this cause." The matter was heard by the Judge *Pro Tempore* on February 28, 1986, and his written letter opinion was dated April 4, 1986. App. at 97. In the opinion, the Judge *Pro Tempore* stated that he had reviewed, among other things, "the Hearing Transcript of February 28, 1986." *Id.* The transcript was submitted to the Clerk of the Circuit Court of Fairfax County, and was stamped "filed" on April 8, 1986, the same day that the letter opinion was marked filed in the record. The final order encompassing the matters outlined in the April 4th letter was entered on April 25, 1986.

The transcript was thus filed by the Judge *Pro Tempore* by stipulation of the parties *prior* to the entry of judgment. Rule 5:11 is simply inapplicable. That rule applies only where an "appellant" has caused the transcript to be filed within 60 days *after* entry of judgment. In those circumstances, counsel for the "appellant" must give written notice of the filing of the transcript to all other counsel of record.

The notice provision in 5:11(b) is apparently intended to preserve the right of the parties to object to the transcript under 5:11(d) if they believe it is erroneous or incomplete. In the present case Appellees knew that the transcript had already been filed by the Judge *Pro Tempore*, and that the Judge *Pro Tempore* had reviewed the transcript in preparing his opinion. Appellees thus had ample notice and opportunity to file

their objections to the transcript. Notably, they still do not complain about any specific errors in or omissions from the transcript.

In all events, there is nothing in Rule 5:11 which makes the notice requirement jurisdictional; and lack of compliance provides no basis for dismissal of the appeal. Petitioner relies on *Towler v. Commonwealth*, 216 Va. 533, 221 S.E.2d 119 (1976) for the proposition that the notice of filing is a jurisdictional requirement. *Towler* was decided under the former Rule 5:9, however, and is therefore totally inapposite. At the time *Towler* was decided, Rule 5:9 expressly provided that a hearing transcript only became part of the record if written notice were given to opposing counsel.[2] The current version of Rule 5:11 is structured entirely differently. Subsection (a) reads

> The transcript of any proceeding is a part of the record when it is filed in the office of the clerk of the trial court within 60 days after entry of judgment.

Thus, under the present Rule, filing of the transcript is the sole prerequisite to inclusion of a transcript in the record; inclusion in the record is no longer contingent on the notice of filing, which is addressed separately in Rule 5:11(b).

There is no support whatsoever for Petitioner's contention that Rule 5:11 is applicable to this matter. Even if Rule 5:11 were applicable, the question would be what remedy should

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[2]At that time, Rule 5:9(b) read:

> The transcript of any hearing also becomes part of the record when it is filed in the office of the clerk within sixty days after entry of final judgment and is accompanied by a notice identifying the transcript and reciting its delivery to the clerk, to which is appended a certificate that a copy of the notice has been mailed to opposing counsel or acceptance of service of such notice by opposing counsel.

(Emphasis added).

be available for any lack of notice. In the circumstances of this case, no relief is necessary, because Petitioner has not suffered, or even alleged, any prejudice. Petitioner stipulated that the transcript would be filed by the Judge *Pro Tempore*. They were also informed the transcript was prepared, and they knew that the Judge *Pro Tempore* had used the transcript in reaching his decision. Moreover, Petitioner never filed any objections to the transcript, and has not complained of any inaccuracies. In light of the complete dearth of evidence of any prejudice sustained by Petitioner, the alleged lack of notice would be, at most, harmless.

In short, the Virginia Supreme Court was thoroughly justified in proceeding with the appeal, and thereby effectively denying without comment the motion to dismiss the appeal insofar as it was based on an alleged technical failure to comply with the Court's own rule. It is fanciful for Petitioner to suggest that there has been a lack of elementary fairness as the invocation of Due Process implies.

3. The Petitioner's Due Process Rights Were Not Violated by the Decision of the Supreme Court of Virginia Denying Petitioner's Motion to Take Judicial Notice of Two Decisions of the Virginia Real Estate Board

Petitioner argues in his third question that due process was denied when the Virginia Supreme Court, which had before it a complete evidentiary record from the trial court's proceedings, denied Petitioner's motion to take notice of the findings in an administrative proceeding to which none of the parties to the appeal was a party.[3] One can imagine a claim of a

[3]Notably, there is nothing in the record that establishes conclusively whether the Virginia Supreme Court granted or denied the motion; it rendered its decision with commenting on the motion. For that reason alone, this assignment of error is invalid.

denial of due process if the appellate court *did* take notice of the administrative findings in those circumstances, but the contrary claim made here is beyond imagination.

By Motion filed February 17, 1989—11 days before scheduled oral argument—the McGowans asked the Court to take judicial notice of two decisions of the Virginia Real Estate Board ("the Board") issued September 7, 1988, in the matters styled *Virginia Real Estate Board v. Max Rush and Anice Sutherland*, File No. 85-01654 and *Virginia Real Estate Board v. Mary S. Ginty and E. B. Stough*, File No. 87-0025. In reviewing lower court decisions, however, the Virginia Supreme Court ordinarily does not consider matters outside of and not made part of the record. *Newton v. Newton*, 202 Va. 96, 116 S.E.2d 94 (1960); *Darrell v. Barber*, 179 Va. 86, 18 S.E.2d 271 (1942). Obviously, the matters sought to be judicially noticed below played no part in the lower court's decision of the cases. In fact, the lower court's orders were entered in 1986, two years before the Board rendered the decisions that were the subject of Petitioner's motion.

Mr. McGowan makes no effort here, and made no effort below, to explain why the Board's decisions are relevant or neces sary to the resolution of the present cases. He did not contend, for example, that the record was somehow incomplete or inadequate for review of the lower court's orders. Mr. McGowan seemed to argue simply that since "nonjudicial records" *may* be the subject of judicial notice under VA. CODE §8.02-390, the Virginia Supreme Court *should* have made such part of the record. Regardless of any particular theories, however, the motion was unfounded and was properly denied.

The Board's proceedings were between persons and entities which were not parties to proceedings in the Supreme Court of Virginia, and involved issues which were not considered by the trial court. The present cases principally in-

volve the Allens' suit against the Lindstroms and the McGowans for specific performance of a contract for the sale of real property, and for an injunction against further construction activities on the property. The Board's proceedings, by contrast, were focused on whether the four real estate agents involved in the listing and sale of the property violated certain of the Board's regulations. Since the Allens were not parties to the Board's proceedings they had no opportunity to present any evidence to the Board. The Board's decisions thus had no collateral estoppel or *res judicata* effects with respect to the present cases; they are immaterial to this proceeding. *See Bates v. Devers*, 214 Va. 667, 202 S.E.2d 917 (1974); *Gordon v. Fairfax County*, 207 Va. 827, 153 S.E.2d 270 (1967); *Patterson v. Anderson*, 194 Va. 557, 74 S.E. 195 (1953). Once again, the due process argument asserted is simply frivolous.

CONCLUSION

For the reasons stated above, the Petition should be denied.

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Supreme Court, U.S.
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(3)

No. 89-66

IN THE
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1989

JAMES LINDSTROM, ET AL,
PETITIONERS,

v.

EDWIN H. ALLEN, ET AL,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

REPLY BRIEF OF PETITIONERS JAMES LINDSTROM, ET AL.

Timothy R. McGowan
Petitioner
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15 pp

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I REPLY TO RESPONDENTS' REQUEST FOR DISMISSAL

Respondents correctly state that the case is governed by substantive and procedural law of Virginia. The question presented in the Writ of Certiorari is whether the Virginia Supreme Court denied the petitioners' right of Due Process by violating the Rules of the Virginia Supreme Court in granting an appeal from the Circuit Court. Respondents also clearly identify Timothy R. McGowan is the sole petitioner. If his right of Due Process was denied, then the rights of all appellees were denied. If the rights of Mr. McGowan are protected then the rights of all citizens are protected.

The respondents do not deny that Rule 5:11(b) was violated. The Respondents are only heard to cry that this is a insignificant violation of the right of Due Process, and this particular violation effects only a few individuals. Therefore, the writ should be dismissed.

The importance of a writ is not determined by the number of petitioners, but by the fundamental rights in jeopardy.

II REPLY TO RESPONDENTS' STATEMENT OF THE CASE

The suit filed in the Circuit Court of Fairfax County by the Allens requested specific performance on a contract made with the Lindstroms to sell a piece of property to the Allens. This contract was entered into with the assistance and guidance of Max Rush and Anice Southerland, real estate agents for Coldwell Banker Residential Real Estate, Inc.

In the trial court opinion, specific performance was denied the Allens based on the misrepresentation of the real estate agents, and the "unjust and inequitable" manner in which the contract was entered into.

III Enforcement of the Supreme Court of Virginia Rule 5:11 is essential to the Petitioners' Right of Due Process.

The Respondents argue that the transcripts were made a part of the record by the Judge *Pro Tempore* and this should relieve the Respondents of the duties imposed by Rule 5:11 of the Supreme Court of Virginia. Judicial economy would allow that is is unnecessary to object to, or correct deficiencies in transcripts of the proceedings of the Circuit Court if no Petition for Appeal were filed.

Rule 5:10 identifies the contents of the Record on Appeal. Rule 5:10 (a)(7) states that the transcripts are "made a part of the record as provided in Rule 5:11". By violating Rule 5:11, the transcripts were never properly made a part of the record on appeal. Only when a transcript becomes a part of a Petition for Appeal is correctness of the transcript essential. Rule 5:11(b) requires the "counsel for the appellant to notify all other counsel of the date on which the transcript is filed" with the Supreme Court of Virginia.

Rule 5:11(d) allows for objections to the transcript on the grounds of "erroneous or incomplete" transcripts. Where the transcripts were part of the record prior to the Petition for Appeal, as in the instant case, objections must be filed "within 10 days after the notice of appeal has been filed with the clerk of the trial court" *Id.* The rules recognize that at times the transcript will be filed prior to the appeal and places different

requirements in the objection process. No exception, or revised procedure is made for compliance with Rule 5:11(b). The rule is mandatory.

The respondents state incorrectly that Rule 5:11 is non jurisdictional. Rule 5:11 I. GENERAL CONSIDERATION reads:

> **Rule is jurisdictional**. — The provisions of this rule are simple and easily understood, but they are jurisdictional, and failure to comply will result in dismissal, either before or after appeal is awarded. Towler v. Commonwealth, 216 Va 533, 221 S.S.2d 119 (1976).

The respondents state that the Petitioners do not complain about any specific error or omissions from the transcripts. By Rule 5:11(d) of the Supreme Court of Virginia objections must be raised within 10 days of the filing of the Petition for Appeal if the transcripts became a part of the record prior to the petition for appeal. That period expired in August, 1986. Attempts to correct the transcript at this time would be both futile and moot. The correctness of the transcript, and the resolution of errors or omissions are issues governed by the substantive and procedural law of Virginia. The denial of the timely right to review and correct the transcript, and the inclusion of the transcript in the Records on Appeal in violation of the Rules of the Supreme Court of Virginia are the basis of the writ.

It is sufficient to know that the Petitioners were denied the right to review and correct the transcripts, and that the Supreme Court of Virginia relied on these uncorrected transcripts. This sequence of events raises the Question of Due Process.

IV Rule 5:11, Supreme Court of Virginia

The Respondents mislead the Court with the selective use of direct quote and paraphrase of Rule 5:11. For the Court's convenience, the 1986 version of Rule 5:11 is reproduced below. It is the Rule that is applicable to this case. The shading is emphasis added by the Petitioner.

Rule 5:11. Record on Appeal: Transcript or Written Statement.

(a) *Transcript.* — The transcript of any proceeding is a part of the record when it is filed in the office of the clerk of the trial court within 60 days after entry of judgment.

(b) Notice. — Counsel for appellant shall promptly notify all other counsel of the date on which the transcript is filed.

(c) *Written Statement.* — In lieu of a transcript, a written statement of facts, testimony, and other incidents of the case, which may include or consist of a portion of the transcript, becomes a part of the record when:

(1) within 55 days after entry of judgment a copy of such statement is filed in the office of the clerk of the trial court. A copy must be mailed or delivered to opposing counsel accompanied by notice that such statement will be presented to the trial judge no earlier than 15 days nor later than 20 days after such filing; and

(2) the statement is signed by the trial judge and filed in the office of the clerk of the trial court. The judge may sign the statement forthwith upon its presentation to him if it is signed by counsel for all parties, but if objection is made to the accuracy

or completeness of the statement, it shall be signed in accordance with subsection (d) of this Rule.

(d) *Objections.* — Any party may object to a transcript or written statement on the ground that it is erroneous or incomplete. Notice of such objection specifying the errors alleged or deficiencies asserted shall be filed with the clerk of the trial court within 15 days after the date of mailing of the notice of filing the transcript (subsection (b) of this Rule) or within 15 days after mailing of the notice of filing the written statement (subsection (c) of this Rule) is filed in the office of the clerk of the trial court or, if the transcript or written statement is filed before the notice of appeal is filed, within 10 days after the notice of appeal has been filed with the clerk of the trial court. Counsel for the objecting party shall give the trial judge prompt notice of the filing of such objections. Within ten days after the notice of appeal has been filed with the clerk of the trial court. Counsel for the objecting party shall give the trial judge prompt notice of the filing of such objections. Within ten days after the notice of objection is filed with the clerk of the trial court, the judge shall:

(1) overrule the objection;
(2) make any corrections that he deems necessary;
(3) include any accurate additions to make the record complete;
(4) certify the manner in which the record is incomplete; and
(5) sign the transcript or written statement.

At any time when the record remains in the office of the clerk of the trial court, the trial judge may, after notice to counsel and hearing, correct the transcript or written statement.

Source. — Rule 5A:8 Cf. Rules 5:9 and 5:11.

Cross references. — For meaning of "filed with the clerk," "filed in the office of the clerk," "opposing counsel" and "counsel for the appellant," see Rule 5:1.

Law Review. — For survey of Virginia law on pleading and practice for the year 1972-1973, see 59 Va. L. Rev. 1559 (1973). For survey of Virginia law on practice and pleading for the year 1974-1975, see 61 Va. L. Rev. 1799 (1975). For survey of Virginia practice and pleading for the year 1975-1976, see 62 Va. L. Rev 1460 (1976). For 1985 survey of Virginia civil procedure and practice, see 19 U. Rich. L. Rev. (1985).

I. General Consideration.
II. Objections.

I. GENERAL CONSIDERATION.

Purpose of rule. — This rule was adopted as part of an overall revision of the rules, to provide a simplified method of making a transcript a part of the record. Towler v. Commonwealth, 216 Va. 533, 221 S.E.2d 119 (1976).

Rule mandatory. — The jurisdictional nature of this rule necessitates compliance with its mandatory requirements. Towler v. Commonwealth, 216 Va. 533, 221 S.E.2d 119 (1976).

Rule is jurisdictional. — The provisions of this rule are simple and easily understood, but they are jurisdictional, and failure to comply therewith will result in dismissal, either before or after appeal is awarded. Towler v. Commonwealth, 216 Va. 533, 221 S.E.2d 119 (1976).

Transcript of a hearing is not a part of record on appeal if is has not been made such under the requirements of this rule. Washington v. Commonwealth, 216 Va. 185, 217 S.E.2d 815 (1975).

Suspension of time requirements of rules to permit prosecution of an appeal. — See Newsom v. Commonwealth, 207 Va. 844, 153 S.E.2d 235, cert. denied, 388 U.S. 918 87 S. Ct. 2136, 18 L. Ed. 2d 1361 (1967).

The record must contain all evidence necessary and material for the appellate court to determine the existence of errors in the trial court transcript. Wansley v. Commonwealth, 205 Va. 419, 137 S.E.2d 870 (1964), cert. denied, 380 U.S. 922. 85 S. Ct. 920, 13 L. Ed. 2d 860 (1965).

Case will be considered on record sent from lower court. — On appeal the case will be considered on the record which is sent from the lower court, and not upon counsel's recollection of what occurred there. Justis v. Young, 202 Va. 631, 119 S.E.2d 255 (1961).

Trial court's decision presumed correct absent evidence in record to contrary. — Where evidence is presented to the chancellor and a jury on an issue out of chancery, and the chancellor, in his decree, does not follow the findings of the jury, and where the evidence on which the decree is based has not been made a part of the record to be considered by the Supreme Court, it is impossible for the Supreme Court to pass on the point that the decree is contrary to the law and the evidence. The decision of the chancellor is presumed to be correct and is binding. Lawrence v. Nelson, 200 Va. 597, 106 S.E.2d 618 (1959).

Appellant has primary responsibility of presenting evidence to Supreme Court. — An appellant who seeks the reversal of a decree on the ground that is is contrary to the law and the evidence has the primary responsibility of presenting to the Supreme Court, as a part of the printed record, the evidence introduced in the lower court, or so much thereof as is necessary and sufficient for the Supreme Court to give full consideration to the assignment of error. Lawrence v. Nelson, 200 Va. 597, 106 S.E.2d 618 (1959).

Evidence may be stated in narrative form. — The use of narrative statement is a proper method of furnishing a record of evidence and incidents of trial for appeal. Houghtaling v. Commonwealth, 209 Va. 309, 163 S.E.2d 560 (1968), cert. denied, 394 U.S. 1021, 89 S. Ct. 1642, 23 L. Ed. 2d 46 (1969).

Where appellant presented to and had certified by the trial court a "narrative of proceedings" instead of having the testimony transcribed, a motion to dismiss was denied. Collins v. Pulaski County, 201 Va. 164, 110 S.E.2d 184 (1959); Valentine v. County of Brunswick, 202 Va. 696, 119 S.E.2d 486 (1961).

Refusal of court to sign or alter narrative statement. — Where trial judge was informed that court reporter would be present to record proceedings and consequently failed to take any notes during trial, the court did not err in refusing to sign plaintiff's narrative statement or in failing to make alterations in, and additions to, the statement in an attempt to render it accurate and then sign it. Woods v. R.D. Hunt & Son, 207 Va. 281, 148 S.E.2d 779 (1966).

Remedies where judge refuses to certify evidence. — While mandamus will lie to compel a judge to certify the evidence when he shall so refuse, it is also error to so refuse, of which any party injured may complain to the Supreme Court,

and for which that Court will reverse the judgment of the court below. Harris v. Woodby, Inc., 203 Va. 946, 128 S.E.2d 278 (1962).

Appeal not dismissed where record otherwise sufficient. — Motion to dismiss the appeal on the ground that defendant did not comply with subsection (c) of this rule in that the judge refused to certify the "Statement of Facts Pursuant to Rule 5:9" was denied where the record was sufficient for the adjudication of the issues presented. City of Richmond v. Randall, 215 Va. 506, 211 S.E.2d 56 (1975).

Applied in State Hwy. Comm'r v. Easley, 215 Va. 197, 207 S.E.2d 870 (1974); Old Dominion Iron & Steel Corp. v. VEPCO, 215 Va. 658, 212 S.E.2d 715 (1975); K-B Corp. v. Gallagher, 218 Va. 381, 237 S.E.2d 183 (1977); Sampson v. Sampson, 221 Va. 896, 275 S.E.2d 597 (1981); Owen v. Shelton, 221 Va. 1051, 277 S.E.2d 189 (1981); Goodstein v. Allen, 222 Va. 1 278 S.E.2d 787 (1981); Burns v. Eby & Walker, Inc., 226 Va. 281, 308 S.E.2d 114 (1983); Roe v. Roe, 228 Va. 722, 324 S.E.2d 691 (1985); Barrett v. Barrett, — Va. App. —, 339 S.E.2d 208 (1986).

II. OBJECTIONS.

This rule does not provide the exclusive procedure for correcting errors. Lamb v. Commonwealth, 222 Va. 161, 279 S.E.2d 389 (1981).

But it provides the preferred procedure that should be used in all cases to correct transcripts. Lamb v. Commonwealth, 222 Va. 161, 279 S.E.2d 389 (1981).

Certification by a judge is a judicial act. When counsel for the respective parties are unable to agree on evidence to be included in the proposed transcript or statement, it is the duty of the judge to settle the conflicting views. In so doing, he may make reasonable additions, deletions, or changes, in order that the record may contain a fair statement of the facts. New Bay Shore Corp. v. Lewis, 193 Va. 400, 69 S.E.2d 320 (1952).

Burden upon complaining party to show error. — The burden of showing that the evidence is incorrect or incomplete is upon the complaining party. New Bay Shore Corp. v. Lewis, 1983 Va. 400, 69 S.E.2d 320 (1952).

And to institute proper proceedings for certification of correct record. — If the record before the Supreme Court is not the correct record, it is the duty of the complaining party to institute proper proceedings for certification of the correct record. The Supreme Court must accept the record as they find it. New Bay Shore Corp. v. Lewis, 1983 Va. 400, 69 S.E.2d 320 (1952).

Remedy where judge unable to determine accuracy of transcript or statement. — If, because of the lapse of time or lack of memory, the judge is unable to determine the accuracy of the transcript or statement, and the case is still under his control, he should order a new trial, so that a proper transcript or statement can be prepared. Harris v. Woodby, Inc., 203 Va. 946, 128 S.E.2d 278 (1962).

Correction after docketing of appeal. — Where a criminal appeal was docketed before an error in the trial transcript was discovered, correction could be made only with leave of the Supreme Court. Lamb v. Commonwealth, 222 Va. 161, 279 S.E.2d 389 (1981).

V THE DECISIONS OF THE VIRGINIA REAL ESTATE BOARD WERE GERMANE TO THE ISSUES BEFORE THE SUPREME COURT OF VIRGINIA AND SHOULD HAVE BEEN TAKEN NOTICE OF.

The Respondents state that the Virginia Supreme Court had before it a complete evidentiary record from the trial court's proceedings. By not complying with Rule 5:11(b) the Respondents ensured that the transcripts were incomplete.

The decisions of the Virginia Real Estate Board were based on a complaint filed by Timothy R. McGowan, the Petitioner, in April 1985. The Virginia Real Estate Board (in 1985, the Virginia Real Estate Commission) has certain rules and procedures mandated by the Virginia Code. The procedures include multiple investigations and inquiries. The rules stipulate that if there is a probable violation of the Real Estate rules and regulations by licensed processionals "a formal hearing" is held. The Commonwealth of Virginia becomes the Complainant at the "formal hearing" to assure a fair and impartial proceeding.

The Commonwealth of Virginia stood as complainant in the formal hearing into allegations of impropriety in the procurement of the contract on which the Allens sought specific performance. On September 7, 1988 the Hearing Officer found that Max Rush and Annie Southerland violated eight Virginia Real Estate Regulations in the procurement of the Allen contract. Both Edwin H. Allen and Timothy R. McGowan were witness in the proceedings. The Hearing Officer's findings became the official findings of the Real Estate Board on January 9, 1989. Until that date, the Hearing Officers findings were not subject to disclosure.

The findings of the Real Estate Board go directly to the issues of misrepresentation, dual agency and the inequitability of the Allen contract in complete support of the findings of the trial court.

Upon being made aware of the final ruling of the Real Estate Board, the Petitioners obtained an official copy of the findings, and filed a Motion to Take Judicial Notice in a timely fashion. These findings were germane to the issues before the Supreme Court of Virginia. The findings should have been considered instead of or in addition to the uncorrected transcripts.

CONCLUSION

For the reasons submitted herein and in the petition for Writ of Certiorari, it is respectfully requested that the petition should be granted.

Dated: August 31, 1989

Respectfully submitted,

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